

No. 5:11-HC-02016-H

Respondent.

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## BACKGROUND

Daniel Travis is a fifty-two-year-old male who has been in custody since March 1999. At the time this action was initiated, Travis was serving a 741-day term of imprisonment on a parole violation predicated on his conviction in the District of Columbia Superior Court for Second Degree Child Sexual Abuse. His original convictions for which he was on parole were Possession of Cocaine, violation of the Bail Reform Act, and Prison Breach, in violation of District of Columbia Code §§ 33-541(d), 23-1327, and 22-2601. Travis was due to be released from custody on March 27, 2011; however, on January 25, 2011, the government certified Travis as a sexually dangerous person pursuant to 18 U.S.C. § 4248, thereby staying his release from federal custody.

### A. Personal History

Travis was born in Washington, D.C. and is the youngest of four children. His father left home when Travis was four or five years old, and his mother passed away in 2004. Travis was sexually abused by a neighbor when he was approximately five years old and again by a stranger when he was approximately eight or nine years old. His sister indicated to him in a letter that he suffered sexual abuse as early as age two, but Travis has no personal memories from that time. Travis dropped

out of school in the 8th grade and was institutionalized in juvenile facilities from approximately ages eleven to eighteen.

Travis claims to be heterosexual with no attraction to males. However, during his current term of incarceration, he estimated having sexual contact with males one or two times per month prior to entering the Commitment and Treatment Program for Sexually Dangerous Persons ("CTP") at FCI Butner in March 2011. Travis has never been married, but was previously engaged, and has reported both having a son and having no children.

Travis has spent a large part of his adult life in prison having been convicted of, among other things, assault, burglary, theft, and possession of cocaine. When not incarcerated, he has worked in a variety of jobs, including food service, janitor at Chuck E. Cheese, assistant basketball coach for various middle and junior high schools, and unarmed security guard.

**B. Sexual Offense History**

In March 1985, while on probation, Travis molested a twelve-year-old female student he had been coaching in basketball. He called her at home and told her the team had practice. When she arrived, none of the other team members were present, but Travis ran drills with the girl. Afterward, he gave her a massage because she had allegedly hurt her leg. Travis patted her buttocks then got on top of the girl while she

was lying on her stomach. He massaged her neck then he started humping the girl's buttocks. When she asked him what he was doing, he stopped. Travis was convicted on October 18, 1985, and was sentenced to two to seven years' confinement.

In July 1985, Travis molested a twelve-year-old girl at a church summer school. The girl encountered Travis while she was looking for a staff member, and Travis told her that the staff member was in the chapel. Travis followed her into the chapel and started a conversation with her about playing basketball. Travis then grabbed her by the waist and rubbed his penis against her buttocks. When she told him to stop, he let go with one hand and covered her mouth. He continued to fondle her buttocks and tried to put his hand under her shorts. The girl told Travis her sister was waiting for her outside, and he let her go. Travis was convicted on October 18, 1985, and sentenced to one to three years' confinement, consecutive to the sentence for the March 1985 offense, and four years' probation.

In February 1999, while on parole, Travis molested a fourteen-year-old girl in an enclosed phone room in a middle school. The girl had left her classroom to make a telephone call, and upon exiting the telephone room, Travis forced her back into the room. The girl reported that Travis put his hand over her mouth, raised her skirt and pulled down her underwear,

placed his penis against her buttocks, and ejaculated onto her buttocks. Travis then pushed her from the telephone room and threw money at her. Travis was convicted of Second Degree Child Abuse and received 3 1/3 to 10 years' confinement. Travis has been in custody since his arrest for this offense in March 1999.

#### COURT'S DISCUSSION

The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006), authorizes the indefinite civil commitment of, inter alia, individuals in the custody of the Bureau of Prisons ("BOP") who are determined to be sexually dangerous persons. A "sexually dangerous person" is defined by statute as one "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18 U.S.C. § 4247(a)(5). "Sexually dangerous to others" means that "the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(6).

To obtain an order civilly committing Travis pursuant to § 4248, the government must prove by clear and convincing evidence: (1) that Travis "has engaged or attempted to engage in sexually violent conduct or child molestation"; (2) that Travis

currently "suffers from a serious mental illness, abnormality, or disorder"; and (3) that as a result of the serious mental illness, abnormality, or disorder, Travis "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." United States v. Comstock, 627 F.3d 513, 515-16 (4th Cir. 2010). Clear and convincing evidence is "evidence of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established," or "evidence that proves the facts at issue to be highly probable." United States v. Hall, 664 F.3d 456, 461 (4th Cir. 2012) (quoting Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 450 (4th Cir. 2001)).

#### **I. Custody**

Travis first argues that the BOP has "physical custody" and not "legal custody" over him and that, therefore, he is not "in the custody of the Bureau of Prisons" for purposes of 18 U.S.C. § 4248(a). At the time of his certification, Travis was serving a revocation term for violating his parole on a prior District of Columbia Code offense. Travis contends that District of Columbia Code offenders are committed to the custody of the Attorney General and not the BOP, relying primarily on the Fourth Circuit case of United States v. Joshua, 607 F.3d 379

(4th Cir. 2010). In Joshua, the respondent had been convicted of violating the Code of Military Justice and was thereafter transferred to the BOP pursuant to agreement between it and the Army. The agreement expressly provided that military prisoners in BOP facilities remain in custody of the Army. The Fourth Circuit concluded that such prisoners were merely "confined in" the BOP rather than "committed to the custody of" the BOP, so that the respondent was not "in the custody of the Bureau of Prisons" for purposes of § 4248(a).

Travis' argument that District of Columbia Code offenders are similarly "confined in" but not "committed to the custody of" BOP has twice been rejected by another district judge in this district. See United States v. Wooden, No. 5:10-HC-2151-BO, 2011 WL 2118234, \*2-5 (E.D.N.C. May 27, 2011); United States v. Johnson, No. 5:09-HC-2045-BO, 2011 WL 2118108, at \*3-6 (E.D.N.C. May 27, 2011). On appeal, the Fourth Circuit noted but did not address the issue in Wooden, stating as follows:

The Act authorizes the government to seek commitment of inmates "in the custody of the Bureau of Prisons." 18 U.S.C.A. § 4248(a). Although Wooden's crimes all involved violations of the laws of the District of Columbia, defendants convicted in the District are committed to the custody of and serve their sentences at the place designated by the Attorney General of the United States, see D.C. Code § 24-201.26, and are "subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed," id. § 24-101(a). The district court

concluded that, by virtue of these statutes, Wooden was in the legal custody of the Bureau of Prisons and thus subject to commitment under the Act. See United States v. Joshua, 607 F.3d 379, 388 (4th Cir. 2010) ("[U]nder § 4248 the word 'custody' refers not to physical custody or some qualified derivative but rather to legal custody. The statutory language 'in the custody of the Bureau of Prisons' therefore requires the BOP to have ultimate legal authority over the person's detention."). Wooden does not challenge that ruling on appeal.

693 F.3d 440, 445 n.1 (4th Cir. 2012). Petitioner suggests that the Fourth Circuit could have addressed this issue as one of subject matter jurisdiction, even though the ruling was not challenged on appeal. This court need not guess what the Fourth Circuit may have implied in its footnote, because Travis has presented no persuasive reason to deviate from the district court's well-reasoned analysis in Johnson and Wooden. Furthermore, Joshua is distinguishable because the agreement between the Army and the BOP expressly reserved custody to the Army. Joshua, 607 F.3d at 381-82. There is no such clear expression of intent to divest the BOP of legal custody in this case. Accordingly, the court concludes as a matter of law that Travis was "in the custody of the Bureau of Prisons" for purposes of 18 U.S.C.A. § 4248(a) at the time he was certified.

## **II. Sexually Violent Conduct or Child Molestation**

There is no dispute in this case that Travis has previously engaged in or attempted to engage in acts of child molestation



or violent sexual conduct. This is evidenced by his two 1985 convictions for Indecent Act, as well as his 1999 conviction for Second Degree Child Sex Abuse. See 28 C.F.R. § 549.93 (defining "child molestation" to include "any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years"), cited with approval in United States v. Comstock, 627 F.3d 513, 520 (4th Cir. 2010). Thus, the government has established the first prong of sexual dangerousness by clear and convincing evidence.

### **III. Serious Mental Illness, Abnormality or Disorder**

Travis contends that he does not suffer from a serious mental illness, abnormality or disorder. The court heard testimony on the issue from Drs. Dale Arnold, Tanya Cunic, and Joseph Plaud, and their reports were entered into evidence. (Pet'r's Trial Exs. 2, 3, 5-7; Resp't's Trial Exs. 2-4.) Dr. Arnold opined that Travis suffered from exhibitionism; paraphilia not otherwise specified ("NOS") with pedophilic and hebephilic traits, sexually attracted to females, non-exclusive type; antisocial personality disorder with borderline personality traits; and post-traumatic stress disorder ("PTSD"). Dr. Cunic opined that Travis suffered from paraphilia NOS (hebephilia) and personality disorder NOS (antisocial and

borderline traits). Dr. Plaud concluded that Travis did not suffer from a serious mental illness, abnormality or disorder.<sup>1</sup>

There was disagreement among the experts regarding the legitimacy of a diagnosis of paraphilia NOS with hebephilia as a qualifier. Paraphilias are mental disorders characterized by the following:

(1) recurrent, intense sexually arousing fantasies, sexual urges or behavior;

(2) generally involving nonhuman objects, suffering or humiliation of a partner, or children or other nonconsenting persons;

(3) that occur over a period of at least six months; and

(4) causing clinically significant distress or impairment in important areas of functioning.

American Psychiatric Association, Diagnostic & Statistical Manual of Mental Disorders 566 (4th ed., Text Revision 2000) ("DSM IV-TR"). There are eight specific paraphilias listed in the DSM IV-TR, including exhibitionism and pedophilia, id. at 567, and a ninth category known as paraphilia NOS, which is "included for coding Paraphilias that do not meet the criteria for any of the specific categories," id. at 576. Hebephilia is

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<sup>1</sup>Records from the BOP indicate that Travis received numerous diagnoses while incarcerated, which include impulse control disorder; depressive disorder NOS; anxiety disorder NOS; dysthymia; PTSD; history of pedophilia; antisocial personality disorder; borderline personality disorder; and personality disorder NOS with antisocial, passive-aggressive, and borderline traits.

not listed in the DSM IV-TR. Dr. Arnold testified that hebephilia commonly refers to a sexual interest in pubescent children of ages eleven to fourteen that causes dysfunction or stress in one's life. Dr. Plaud testified that a diagnosis of paraphilia NOS hebephilia is "a made-up label with no validation in the professional community." (Resp't's Ex. 2 at 47.)

While there was previously some debate among the courts regarding whether hebephilia is a valid diagnosis that may satisfy the serious functional impairment prong of § 4247(a)(6), the Fourth Circuit has now settled the issue. In the case of United States v. Caporale, No. 12-6832, 2012 WL 6052021 (4th Cir. Dec. 6, 2012), the court held that "hebephilia, as colloquially understood, is a § 4247(a)(6) 'illness, abnormality, or disorder.'" Caporale, 2012 WL 6052021, at \*7 n.4. The court went on to explain that "[a] diagnosis of hebephilia (or pedophilia, or other mental disorder) is merely the starting point for the court to consider the true thrust of the § 4247(a)(6) inquiry — whether, on a case-specific basis, the respondent's underlying condition constitutes a serious functional impairment." Id.

Travis denied ever being attracted to prepubescent or pubescent girls, but the court finds his testimony on this point not credible in light of the weight of other evidence. All of

Travis's sexual offenses were against prepubescent or young pubescent girls. Travis testified that, prior to his incarceration, he socialized with teenagers because he wanted to relive his youth and experience things that he missed out on as a teenager. Dr. Arnold noted Travis's "insistence on being in close proximity to [prepubescent and pubescent children] after his 1998 parole order expressly stated he should not [] be in contact with children." (Pet'r's Ex. 3 at 12.)

Although Dr. Plaud testified that there is no evidence that Travis has a present preoccupation with prepubescent or pubescent girls, the court notes that Travis has not been in the community since his arrest shortly after his last offense and, therefore, has not had access to young girls. Dr. Arnold testified as to the chronic nature of paraphilias and noted that Travis has not completed sex offender treatment. The court also notes that an August 2011 search of Travis's property revealed a list of what appeared to be pornographic websites and X-rated movies and that noted among them was the web address "streetandsmithshighschoolgirlsbasketball.com," which on its face relates to high school girls' basketball. A picture of a girls' high school basketball team was also found among his property.

The evidence also shows that Travis's paraphilia has had a significant negative impact on his ability to function normally in society. The fact that Travis was engaged to an adult female at the time of his last offense illustrates the serious disruption of his paraphilia upon his life. Even after his incarceration, Travis's paraphilia continued to impact his functioning. Dr. Arnold noted in his report that BOP records indicated that Travis was seen in June 2010, "in routine follow-up for management of sexual preoccupation and paraphilia," and that Travis stopped taking his medication despite poor control over sexual urges. (Pet'r's Ex. 3 at 17.) Dr. Arnold also noted that during a therapeutic contact in 2009, Travis admitted that "he needed to obtain 'help' relative to his attraction to adolescent girls." (Id. at 12.) As a result of his impairment, Travis has been incarcerated for significant periods of time causing substantial disruption in his life. The court credits the testimony of Drs. Cunic and Arnold and finds that there is clear and convincing evidence that Travis suffers from a paraphilia, be it termed hebephilia or paraphilia NOS, that is a serious mental disorder within the meaning of 18 U.S.C. § 4247(a)(6).

There is also disagreement among the experts as to whether Travis currently suffers from exhibitionism. Exhibitionism is

characterized by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the exposure of one's genitals to an unsuspecting stranger," and that "[t]he person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty." DSM IV-TR at 569.

Dr. Arnold noted that Travis began exposing himself and masturbating in view of female BOP staff while incarcerated in 2000 and that that these behaviors continued over a ten-year period. Dr. Plaud, in declining to diagnose exhibitionism, opined that Travis's exhibitionistic behavior was motivated by anxiety and mood disturbance associated with incarceration and not intense sexually arousing fantasies, urges, or behaviors. Dr. Plaud also noted that there is no evidence that Travis engaged in this behavior prior to his incarceration and that a lack of recent disciplinary reports for this behavior evidences that he has learned to control his exhibitionistic urges.

Travis's own statements regarding his exhibitionistic behaviors undermine Dr. Plaud's opinion. Travis, in a 2003 letter to a BOP official, explained that he had masturbated for a number of female staff members and that they let him do it because they enjoyed watching him rub his penis. (Pet'r's Ex. 3 at 13.) Dr. Arnold explained that this type of distorted

thinking is common in a person suffering from exhibitionism, and the DSM IV-TR bears this out. See DSM IV-TR at 569 (noting that in some cases "the individual has the sexually arousing fantasy that the observer will become sexually aroused" by the exhibitionism). That Travis has progressed over the last year in controlling his urge to expose himself to female staff members should not be minimized, but goes more to the serious-difficulty prong of the analysis. Travis's numerous sanctions due to exhibitionistic behavior have caused substantial impairment in his ability to both adjust to confinement and receive treatment. Therefore, the court finds that the government has proved by clear and convincing evidence that Travis suffers from exhibitionism, a serious mental disorder within the meaning of 18 U.S.C. § 4247(a)(6).

With respect to diagnoses that are non-paraphilic in nature, Dr. Arnold and Dr. Cunic are essentially consistent in their diagnoses of personality disorder NOS with antisocial and borderline traits.<sup>2</sup> Dr. Arnold noted that Travis has exhibited anti-social traits, including "a failure to conform to social

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<sup>2</sup>Dr. Arnold also diagnosed Travis with PTSD. Dr. Plaud concluded that Travis may suffer from an anxiety or mood-based disorder, such as PTSD, but did not actually diagnose him with any such disorder. Dr. Cunic did not diagnose Travis with PTSD. Petitioner does not contend that PTSD satisfies the serious-impairment prong and, therefore, the court does not address PTSD as a possible basis for civil commitment.

norms with respect to lawful behaviors; deceitfulness as indicated by manipulating staff, use of an alias, and lying about familial deaths for the sake of attention; impulsivity (e.g., reaction to stressors); and a reckless disregard for the safety of others;" as well as borderline traits, including "recurrent suicidal threats; identity disturbance (e.g., claims to have gender identification issues); and affective instability (e.g., intense episodic dysphoria, irritability, and anxiety)." (Pet'r's Ex. 3 at 13.) Dr. Arnold further testified that Travis exhibited the borderline traits of emotional instability and an unstable sense of self, which were exhibited, at times, by his grandiose sense of self and, at other times, by his very low sense of self and suicidal ideations.

While Dr. Plaud did not diagnose Travis with a personality disorder, he did make the following observations, which tend to support the diagnoses of Drs. Arnold and Cunic:

[T]here is a major area of concern revealed in the testing data on Mr. Travis that focuses on the interplay between anxiety, perhaps even traumatic anxiety and its historical relationship to his being impulsive and prone to behaviors likely to be self-harmful or self-destructive. According to an analysis of the testing data on the PAI [Personality Assessment Inventory], Mr. Travis revealed that he has experienced or may experience to a mild degree, maladaptive behavior patterns aimed at controlling anxiety.



(Resp't's Ex. 2 at 14). Dr. Plaud also noted Travis's history of antisocial behavior. (Id.) There are numerous instances of how Travis's personality disorder has negatively impacted his ability to function normally, both in the community and in custody.

Under the current state of the law, it is unclear whether a personality disorder, standing alone, is a sufficient basis for civil commitment under the Adam Walsh Act. See United States v. Begay, No. 5:11-HC-2197-BO, 2012 WL 3043200, at \*4 (E.D.N.C. July 25, 2012) (questioning whether antisocial personality disorder, absent a companion diagnosis of a sexual disorder or paraphilia, "rises to the level of a serious mental disorder that is a sufficient basis upon which to predicate civil commitment under the Adam Walsh Act"). However, the court need not reach that issue here, as the evidence in this case establishes that Travis has a paraphilic condition that is "a serious mental illness, abnormality or disorder" for purposes of § 4248. Thus, the government has established the second prong of sexual dangerousness by clear and convincing evidence.

#### **IV. Serious Difficulty Refraining from Sexually Violent Conduct or Child Molestation**

The serious-difficulty prong requires that the government prove by clear and convincing evidencing that Travis, if released, would have serious difficulty refraining from sexually

violent conduct or child molestation as a result of a serious mental illness, abnormality or disorder. This prong "serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." United States v. Hall, 664 F.3d 456, 463 (4th Cir. 2012) (quoting Kansas v. Hendricks, 521 U.S. 346, 357 (1997)). It requires the court to conduct a "forward-looking inquiry, which attempts to predict the inmate's 'ability to refrain from acting in accord with his deviant sexual interests.'" United States v. Wooden, 693 F.3d 440, 460 (4th Cir. 2012) (quoting United States v. Francis, 686 F.3d 265, 275 (4th Cir. 2012)).

The government need not establish that the person it seeks to commit will or is likely to reoffend. However,

there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Kansas v. Crane, 534 U.S. 407, 413 (2002).

The mere presence of a sexual attraction to minors is insufficient to meet the "serious difficulty" prong. United States v. Carta, No. 07-12064, 2011 WL 2680734 (D. Mass. July 7, 2011), aff'd, No. 11-1921, 2012 WL 3064842 (1st Cir. July 27,

2012). "[I]f the person the government seeks to commit has developed the skills necessary to overcome the urge to have sexual contact with minors without [serious] difficulty," the government fails in meeting its burden as to this prong of the test. Id.

The court heard testimony from each expert witness on the serious-difficulty prong. Drs. Arnold and Cunic answered this question in the affirmative, while Dr. Plaud answered in the negative.

Dr. Arnold opined in his report that Travis suffers from serious mental disorders that will result in Travis having serious difficulty refraining from sexually violent conduct or child molestation if released. (Pet'r's Ex. 3 at 13-14). He specifically noted that "the combination of being sexually attracted to children, sexual preoccupation (represented by exhibitionism and his self report), and a personality disorder, are serious because they affect what Mr. Travis is sexually attracted to (e.g., children) and diminish his ability to effectively manage that attraction." (Id. at 14.) Dr. Arnold does not believe Travis fully understands the harmfulness of his behavior, noting as an example that Travis claimed the sexual abuse he committed was not as bad as the sexual abuse he himself suffered as a child. This is illustrated by Travis's testimony

on direct that he did not "hurt" his victims, although he clarified on cross that by "hurt" he meant hit or punch. Dr. Arnold also expressed concern that Travis does not adequately understand how to prevent himself from engaging in such conduct in the future.

Dr. Arnold scored Travis as a "5" on the Static-99R and opined that he belonged in the High Risk/Need offender group. Representative offenders have shown recidivism rates of 25% in five years and 36% in ten years. Dr. Arnold scored Travis as a "6" on the Static-2002R and, again, opined that he belonged in the High Risk/Need offender group. Representative offenders have shown recidivism rates of 24% in five years and 34% in ten years. Dr. Arnold concluded, based on these actuarials, that Travis would be at medium-high risk of committing another sex crime in the future.

Dr. Arnold also considered dynamic risk factors such as Travis's strong sexual preoccupation; interpersonal difficulties, which interfere with Travis's ability to interact appropriately with others; poor self-regulation and problem solving skills; emotional identification with children; cognitive distortions (e.g., that female staff members enjoy watching him masturbate and attributing his offending to flashbacks); and impulsivity. Dr. Arnold considered Travis's

age as a potential mitigating factor, but found Travis's sexual intensity to be increasing rather than decreasing as evidenced by his high level of sexual preoccupation and the fourteen-year period between his second and third offense, during which time one might have expected his control to improve. Dr. Arnold concluded that respondent's sexual intensity had been relatively high and his control had been relatively low despite efforts to improve upon this issue. Dr. Arnold also expressed concern that Travis had discontinued medication to help control his sexual urges, which he previously claimed was working well.

Dr. Cunic originally opined, in 2008, 2010, and 2011,<sup>3</sup> that respondent did not meet the criteria for civil commitment as a sexually dangerous person under the Adam Walsh Act. Dr. Cunic testified that she was "on the fence" about a number of things, such as that Travis had a diagnosis of exhibitionism, which she opined, in and of itself, does not necessarily rise to sexually violent conduct; that Travis had a period of time out in the community where it appeared that he had not sexually offended; and that there was a period of time that it seemed like Travis's behavior was improving in the institution. On the other hand, she explained that it was problematic that Travis had violated

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<sup>3</sup>Her first two reports were written for the benefit of the precertification panel and the third report was in response to a court order directing that updates be issued in all pending § 4248 cases.

the terms of his supervision on more than one occasion and that he did actually have several prior acts of child molestation. She also assessed Travis's risk of re-offense using the Static-99R and scored him as a "5," which was consistent with Dr. Arnold's assessment.

Dr. Cunic testified that she found Travis's case to be an especially difficult one and took a very conservative approach, explaining that although she previously believed Travis did not meet the criteria of a "sexually dangerous person" under the Adam Walsh Act, she still considered him to be at risk for sexual re-offense if released into the community and suggested that he would benefit from a period of supervision. (Pet'r's Ex. 5 at 10).

In September 2012, Dr. Cunic issued a revised report in which she changed her opinion and concluded that Travis was a sexually dangerous person. Dr. Cunic testified that she changed her opinion based on a series of behaviors by Travis, which she found to be remarkably concerning and which impacted the dynamic risk factor assessment. Dr. Cunic explained that in July 2011, there started to be an ongoing series of problems indicating to her that Travis was still sexually preoccupied. She noted the sexually explicit writings that were found, reports that he had resumed tracking female staff, that he was essentially being

non-responsive to treatment and openly aggressive with his treatment providers, and that he was receiving incident reports.

Dr. Cunic concluded that Travis exhibited significant backsliding in both his sexual and non-sexual behavior. She found most significant that Travis was exhibiting behaviors that appeared to her to be very similar to his past offenses. She compared his tracking of female staff (i.e., following or surreptitiously watching them through windows) with how he watched then followed his second victim to the chapel or his third victim in the phone booth, which led to sexual misconduct. Dr. Cunic testified that the change in dynamic factors, viewed in combination with Travis's history, compelled her to change her opinion and conclude that Travis is a person suffering from a serious impairment as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation.

Finally, Dr. Plaud determined that there was significant doubt as to whether Travis would, at this time, have serious difficulty in refraining from sexually violent conduct or child molestation if he were released into the community. Dr. Plaud opined that Travis had shown a de-escalation of sexually related behavior in the last two years. Dr. Plaud stated in his report that Travis "now has recognition of the precipitants of his own

sexually abusive behavior, and importantly he has shown behavioral stability to an extent that is significantly greater than at any earlier point in his life." (Resp't's Ex. 2 at 2.) In his testimony, Dr. Plaud characterized Travis as someone who has obviously decided that that the CTP at Butner is not for him and concluded that Travis has some conflicts with the treatment providers, "so he is being a pain."

Dr. Plaud acknowledged that at the time he wrote his report, he was not aware of Travis's more recent behavioral issues, but testified that Travis's non-sexual behavioral problems have no bearing on his sexual dangerousness, i.e., his ability to control his sexual impulses. In fact, Dr. Plaud ascribed little significance to Travis's past sexual offenses in determining the serious-difficulty prong due to the fact that they occurred some time ago. Dr. Plaud also considered Travis's age as a mitigating factor, because Travis was much younger when he committed his last offense and sexual offense recidivism is significantly reduced in men in their 50s. Dr. Plaud, who is critical of the Static-99R, assessed Travis's risk for recidivism using the Multisample Age-Stratified Table of Sexual Recidivism Rates ("MATS-1"). Dr. Plaud placed respondent in the "High" risk category, which corresponded to a 23.2% likelihood of re-offense and conviction within eight years.



Having considered the experts' reports and testimony at the hearing, the court finds the testimony of Drs. Arnold and Cunic more persuasive than that of Dr. Plaud. The court is troubled by Dr. Plaud's approach of discounting – seemingly to the point of irrelevance – historical evidence such as offense history and any non-sexual misconduct, and notes that in Caporale, the Fourth Circuit took issue with the district court's reliance on Dr. Plaud's testimony "based on the perception that his opinion on the serious-difficulty prong considered [the respondent's] current state more thoroughly than the opposing experts." Caporale, 2012 WL 6052021, at \*12. In the present case, all three experts offered well-reasoned opinions as to how Travis's current state cuts in assessing the serious-difficulty prong. However, the opinions of Drs. Arnold and Cunic were well-balanced in that they considered Travis's past history as well as his current state.

In addition to the expert testimony, the court also, in accordance with Wooden and Caporale, considered the nature of Travis's prior crimes, the frequency and nature of Travis's institutional infractions, and the substance of Travis's testimony and manner in which he testified.

Travis has a history of sexual crimes against prepubescent and young pubescent children. His three sexual offenses shared

the common characteristics of Travis using his association with coaching basketball to engage his victim, isolate her, and then molest her by forcibly rubbing his penis against her buttocks. That he persisted in his pattern illustrates the strong and enduring nature of his impulse. This is supported by Dr. Arnold's testimony that the significant gap in time between Travis's first two offenses and his last offense was indicative of increasing, not decreasing sexual intensity. It is also telling that Travis was undeterred by incarceration after his first two offenses and, in fact, reoffended while on parole. Finally, that his second and third offenses were more impulsive in nature and occurred in settings where he could have been easily discovered supports a finding of impulsivity and lack of control. Accordingly, the court finds that the nature of Travis's offenses is compelling evidence that he lacks the ability to stop himself from acting on his sexual impulses.

In addition to Travis's offense history, the court has also considered Travis's conduct during his present incarceration. Travis's last sexual offense was in 1999, and he has been incarcerated since that time. Despite incarceration, Travis's paraphilia has continued to manifest through alternative forms of sexual misconduct. Dr. Andres Hernandez, a licensed psychologist and the clinical coordinator of the CTP, testified

as a fact witness. Dr. Hernandez, through both his personal interactions with Travis and his supervision of the other CTP treatment providers, was privy to Travis's history while in the CTP from March 2011 to February 2012.

When Travis first expressed interest in the CTP in March 2011, Dr. Hernandez responded that he was concerned about Travis's poor institutional conduct as evidenced by his long history of incident reports for behaviors such as "tracking" or "stalking" female staff members by positioning himself to surreptitiously watch them while fondling himself for sexual gratification; masturbating in front of female staff members; fabricating situations for the purpose of interacting with female staff members; and fighting or being verbally aggressive with others. Dr. Hernandez did not personally observe this prior conduct by Travis, but it is well documented in the BOP records. (See, e.g., Pet'r's Ex. 77 at 1-2.) Travis agreed to follow strict behavioral guidelines, which were memorialized in writing (Pet'r's Ex. 76), and was admitted to the CTP. However, Dr. Hernandez testified that Travis's behavioral problems persisted.

In April 2011, Travis was placed on a Behavior Management Plan ("BMP"), which indicated that Travis had exhibited stalking behaviors, such as repeatedly walking past and peering into

female staff offices; isolating female staff; positioning himself to track female staff; and deceptively and manipulatively seeking clinical services from female staff. (Pet'r's Ex. 77 at 1.) Travis did not receive any discipline reports for these behaviors, and he successfully completed the BMP in July 2011.

On July 20, 2011, Travis was placed in the Annex, a segregation area, for engaging in "risk-relevant behavior." (Pet'r's Ex. 81.) Travis admitted to Dr. Hernandez that while observing a female staff member walking outside of the housing unit, he sexually stimulated himself by rubbing his erect penis over his pants and had sexual fantasies about the female staff member. (Id.) At the hearing, Travis denied this conduct and claimed that after repeated questioning by Dr. Hernandez, Travis simply admitted the conduct so that he could move on.

On August 30, 2011, prohibited materials were found in Travis's cell during a routine search, including both non-explicit and sexually explicit writings and photos, the "streetandsmithshighschoolgirlsbasketball.com" web address, and a picture of a girls' high school basketball team. (Pet'r's Ex. 82.) Copies of three representative pages of prohibited materials were retained by the CTP staff. (Pet'r's Ex. 85 at 1). Dr. Hernandez testified that possession of the picture and

website referencing a girls' basketball team were considered risk relevant behavior due to the fact that Travis's prior sexual crimes were connected to coaching girls' basketball. Travis admitted the materials were his and that he had previously planned to view them upon release, but claimed that he thought he had thrown them out.

At the end of September 2011, a second BMP was implemented due to Travis's continued negative behavior and poor adherence to the CTP. (Pet'r's Ex. 83). In October 2011, the BMP was modified based on Travis' continuing to engage in "risk relevant behavior to include sexual arousal fantasies involving sexual aggression" and reportedly engaging in "stalking-like behavior during times that he has been unescorted by chaperones." (Pet'r's Ex. 86 at 2.) In January 2012, Travis successfully completed the October BMP. However, Dr. Hernandez testified that Travis's behavior quickly deteriorated, as evidenced by a February 17 2012 incident where Travis became verbally aggressive and physically menacing with a staff psychologist. (Pet'r's Ex. 88 at 4.) As a result of this incident, Travis was expelled from the CTP program with leave to reapply in 60 days. Travis did not reapply.

On May 8, 2012, Travis was involved in another altercation with CTP staff when he was observed in the Maryland Unit, where

CTP inmates are housed, without permission. Dr. Hernandez confronted Travis, who responded aggressively by yelling profanity at Dr. Hernandez and "throwing an elbow" at another doctor. At the hearing, Travis testified that he was simply trying to do his laundry in the Maryland Unit and that he became angry upon being confronted, but that he did not attempt to physically strike anyone. A Discipline Hearing Officer Report indicated that Travis was found guilty of "Threatening Another with Bodily Harm or any other Offense." (Pet'r's Ex. 91.)

Travis contends that his discipline problems are attributable to the fact that he is angry about being held in custody unjustly. Travis maintains that he has "nothing against Dr. Hernandez," but that he believes Dr. Hernandez made up things about him, or believed lies that other inmates told about him, and so Travis had to stand up for himself. This explanation fails to account for Travis's long history of disciplinary problems that began prior to his enrollment in the CTP and even long before his present incarceration. Travis has exhibited a continuing pattern of instability and impulsivity from the time he was a juvenile through his present incarceration. There is clear and convincing evidence that Travis frequently lacks volitional control, which manifested itself as recently as August 2012, when he was placed in the

Annex after he was observed repeatedly to be "behaviorally agitated, emotionally dysregulated, and continuing to engage in hostile/oppositional/defiant behavior toward female staff." (Pet'r's Ex. 94.) BOP fill-in-the-blank forms from February, March, June, and September 2012 (Resp't's Exs. 7-10), which indicate Travis's behavioral adjustment to custody was "Satisfact[ory]," are not persuasive in light of the voluminous specific evidence to the contrary.

Travis further contends that his inability to follow institutional rules does not prove that he is sexually dangerous. This ignores Travis's history of sexual misconduct throughout his incarceration in the BOP. (See Pet'r's Ex. 19 (2001 - masturbating in view of female staff); Pet'r's Ex. 24 (2002 - same); Pet'r's Ex. 28 (2003 - same); Pet'r's Ex. 30 (2004 - noting that Travis exposed himself and/or masturbated in view of female staff on "innumerable occasions"); Pet'r's Ex. 32 (2005 - masturbating in view of female staff); Pet'r's Ex. 35 (2006 - same); Pet'r's Exs. 38, 39 (2007 - possession of pornography and noting Travis's history of stalking female staff and masturbating in front of them); Pet'r's Ex. 51 (2008 - masturbating in view of staff); Pet'r's Exs. 58, 60 (2010 - same); Pet'r's Ex. 81 (2011 - same)). Dr. Arnold noted that although he does not consider exhibitionism to be either

sexually violent conduct or child molestation (e.g., if he exposed to a child), he believes Travis's problems with masturbation and exhibitionism are indices of sexual intensity and sexual control. Although it appears Travis has not committed any sexually violent acts while in custody, his inability to refrain from prohibited sexual conduct in a custodial setting is highly suggestive of an inability to control his sexual urges upon release into the community.

The court has also considered Travis's own testimony. In his deposition, Travis explained that he has struggled with his own sexual abuse throughout his life and has suffered from flashbacks of the abuse. He said that he held in the abuse and did not talk about it so that in his mind it became "worse and worse" over the years until he "acted out" by molesting his victims. (Resp't's Ex. 5 at 30.) Travis described his mind as being overwhelmed by flashbacks of his own abuse and said that he would react by doing "something similar to someone [he] was with for however long it lasted." (Id. at 42.) At the hearing, Travis testified that his first two sexual offenses were not planned. For example, he testified that, in his mind, he actually called a team practice and did not lie to his first victim about the practice with the intent to lure her in and later commit a sexual act. Similarly, Travis testified that, in



his mind, he believed it was true when he told his second victim that a staff member was in the chapel and that he did not plan to isolate her and commit a sexual act. Dr. Arnold expressed great concern that Travis continues to attribute his sexual misconduct to flashbacks, which Dr. Arnold suggested is a rationalization for and minimization of Travis's behavior and indicates that Travis does not fully understand the risk factors associated with his sexual offending.

Travis testified at the hearing that he is not sexually dangerous and that he does not believe that he was ever sexually dangerous. This contradicts Travis's own deposition testimony from January 2012, when he made clear that he believed that before he started CTP he would have been a danger to the community if released because he did not believe that he had a problem at that time. (Id. at 35-37.) Travis stated at his hearing that he could not get help in the CTP because it is a prison setting, but at his deposition he claimed that the CTP had been "very helpful." (Id. at 31.) Travis's conflicting testimony undermines his credibility.

Travis testified that he liked to interact with children through coaching basketball and that it was a way to regain his youth lost to time spent in juvenile facilities. When Travis was in his early to mid-twenties he would socialize with

fifteen- to seventeen-year-old boys and girls and had a sixteen-year-old girlfriend with whom he engaged in sexual activity. (Id. at 60-61.) Dr. Arnold identified Travis's emotional connection with young people as a risk factor for reoffending. Furthermore, although Travis contends that he now understands he can never be around children, Dr. Arnold testified that Travis appears to be engaging in "impression management" to show that he is no longer at risk.

Travis testified that his problems were caused by his own abuse but they can be corrected. He believes he can control himself and obtain help if released. Dr. Arnold testified that Travis's personality disorder interferes with his ability to get treatment for his paraphilia and that Travis requires intensive treatment cannot be received in an outpatient setting. This is consistent with Dr. Hernandez's testimony that Travis wanted to address his flashbacks and own victimization through counseling, but that Travis was unable to reach that level of treatment due to his behavioral issues.

Finally, Travis testified that if released he intends to return to Washington, D.C., and live in a halfway house for sex offenders while he obtains treatment. Travis indicated that he has family support from a sister, but that he cannot live with her because it would place him in close proximity to children.

Travis acknowledged that he would have no employment or money upon release and that he has no period of supervised release remaining on his sentence. It is unclear what tools Travis has since gained to manage his impulsivity and sexual urges if released with no supervision. Even after seven months in CTP, it was noted that while Travis had exhibited a desire to change his behavior, which the court finds is a significant and positive step, Travis "continue[d] to struggle with his sexual behavior problem," "engaged in high risk behaviors," and "continue[d] to fail to hold himself accountable." (Pet'r's Ex. 86 at 2-3.) As noted above, Travis was expelled from CTP shortly thereafter and has received no further treatment.

Travis suggests that he is merely a common criminal who committed sex offenses and that there is no link between his violent conduct and his sexual conduct to indicate that he is sexually dangerous. Dr. Plaud emphasized the fact that Travis has not engaged in any masturbatory activities in which he has placed himself in a position to be seen since July 2011 and that he has made "significant strides" since that time. In fact, Dr. Plaud testified that what happened in 1985 (i.e., Travis's prior sexual offenses) has nothing to do with prediction of risk. While the court considers Travis's recent conduct highly probative, it cannot be viewed in isolation. The Fourth Circuit

instructed in Caporale that "[f]or a court assessing the likelihood of recidivism upon a respondent's proposed release among the general public, an examination of the respondent's criminal conduct undertaken in the same setting – though having occurred a number of years past – may be the most probative predictor." Caporale, 2012 WL 6052021, at \*12 n.7.


Travis's offense history, incarceration history, and testimony all indicate he has a long history of paraphilia and personality disorder, which act in concert to impede his ability to control his sexual urges. While Travis took an important first step in starting treatment, he completed only the introductory phase before being expelled from the program for non-compliance. The court lacks confidence that Travis has sufficient tools to manage his serious impairment if released into the community at this time. Rather, the court finds, by clear and convincing evidence, that Travis, if released, would have serious difficulty in refraining from sexually violent conduct or child molestation as a result of his paraphilia and personality disorder.

#### CONCLUSION

For the foregoing reasons, the court finds that Daniel Travis is a sexually dangerous person under the Adam Walsh Act. Accordingly, it is hereby ordered that Daniel Travis be

committed to the custody and care of the Attorney General  
pursuant to 18 U.S.C. § 4248.

This 7<sup>TH</sup> day of January 2013.

  
MALCOLM J. HOWARD  
Senior United States District Judge

At Greenville, NC  
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